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No. 84-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE CHLORINE INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PAUL M. DONOVAN
Counsel of Record

LAROE, WINN & MOERMAN
Suite 800
1120 G Street, N.W.
Washington, D.C. 20005
(202) 628-2788

Counsel for The Chlorine Institute, Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Pursuant to Rule 36 of the Rules of this Court, The Chlorine Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

The Chlorine Institute, Inc., formed in 1924, is an association of more than 115 firms comprising chlorine

producers and related companies in the United States, Canada and overseas. The association, headquartered at 70 West 40th Street in New York City, includes numerous large chemical companies in its membership, many of whom are vertically integrated firms which produce chemicals to be sold as raw products to other chemical companies. In addition, these same firms compete with their customers in the sale of finished products.

The Third Circuit decision which the petitioners have asked this court to review represents an unwarranted extension of the "price squeeze" doctrine affecting vertically integrated producers. Although The Chlorine Institute, Inc. has no direct interest in the outcome of the case at hand, it believes that the decision below threatens the viability of vertical integration as a legitimate business practice for the reasons set forth below.

ARGUMENT

UNLESS REVIEW IS GRANTED, THE THIRD CIRCUIT'S UNPRECEDENTED "PRICE SQUEEZE" HOLDING WILL HAVE WIDE AND ADVERSE CONSEQUENCES ON TRADE IN MANY INDUSTRIES, IN ADDITION TO THE ALUMINUM INDUSTRY.

The "price squeeze" doctrine, which originated in its orthodox form with Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), is one of the principal antitrust doctrines that is applicable exclusively to vertically-integrated firms in relatively concentrated industries. Vertical integration is a form of industrial

organization that often makes possible significant economies of scope and scale and increases in efficiency in basic industrial sectors, and thus tends to advance the ultimate goal of the antitrust laws, the enhancement of consumer welfare by guaranteeing the highest quality goods at the lowest prices. Judicially-fashioned rules, such as the "price squeeze" doctrine, that threaten vertical integration may also threaten important goals of antitrust policy, unless those doctrines are narrowly tailored to deal precisely with the anticompetitive conduct in question. Since many important industries, including the chemical industry, are comprised of vertically integrated firms that sell finished products in competition with rivals whom they supply with semi-finished goods or raw materials, the question presented in the petition is one that has broad economic consequences for many sectors of the economy.

Vertically-integrated producers of raw materials or semi-finished products often compete either directly with their customers or with their competitors' customers in the sale of finished products. In that competition, non-integrated producers may, for a variety of reasons, be unsuccessful competitors on the basis of price. They may be less efficient. They may require a raw material for which there exists a strong demand for other uses. Until the Third Circuit decision in this case, the courts had recognized no cause of action under the antitrust laws in such circumstances unless the pricing by the vertically-integrated producer was part of an exercise of monopoly power, *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), or was pursuant to a horizontal conspiracy with other suppliers to fix prices.

The court below appears to have ignored these important qualifications of the *Alcoa* "price squeeze" doctrine. It imposed multi-million treble-damage liability on a vertically-integrated producer for a "price squeeze" between the price paid for a semi-finished product by the independent and the prices charged by the vertically-integrated producer for the finished product, even though the independent producer for the finished product did not purchase its raw material from the antitrust defendant. There was evidence neither that the plaintiff's supplier had conspired with the antitrust defendant to fix the independent's raw material price, nor that the antitrust defendant possessed monopoly power over price in the relevant market of the raw material. As such, there was no evidence of a cognizable antitrust nexus between the "squeeze" experienced by the independent and any conduct by the vertically-integrated defendant.

Where a vertically-integrated producer is not shown to possess monopoly power over price in the raw material or semi-finished product, the independent not only has alternative sources of supply from which to purchase its requirements for such products but has the ability to buy its raw material at a normal market-determined price. The existence of such alternate sources of supply normally prevents the integrated producer from successfully "imposing" artificially high, monopoly prices upon the independent. Here the independent has alternative sources of supply—Alcoa and Reynolds—in addition to Kaiser. Liability for a "price squeeze," if recognized at all, should be, and until this decision always had been, limited to the *Alcoa* context, *i.e.* where *no* significant, alternate source of supply exists and the integrated pro-

ducer has *monopoly power* over price in a defined raw material market.

The Third Circuit nonetheless held that a *non-monopolist* integrated producer can be guilty of monopolization under Section 2 of the Sherman Act even though the independent has alternate sources and relies on other sources for its supply of raw material or semi-finished products, if there exists some evidence of "price leadership"—regardless of the nature of such "price leadership" and regardless of the ambiguity of such leadership as to relevant market. The holding is novel and, if it stands, could subject vertically-integrated companies to liability without fault or even knowledge of the material prices or manufacturing costs of non-integrated independents.

The novel and startling aspects of the Third Circuit's holding in this case are compounded by the fact that it is undisputed in this case that petitioners never sold aluminum culvert pipe in competition with their non-integrated rival at prices that were below their costs. Liability was imposed on the basis of purely competitive, non-predatory pricing—pricing that could only *benefit* consumers.

The Third Circuit's ruling is a dangerous extension of the conventional "price squeeze" doctrine and one that seriously threatens vertical integration as a legitimate and beneficial form of industrial organization.

Respectfully submitted,

PAUL M. DONOVAN
Counsel of Record

LAROE, WINN & MOERMAN
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1120 G Street, N.W.
Washington, D.C. 20005
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Counsel for The Chlorine Institute, Inc.